No. 15502

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

MOE WEISE and JAMES LESTER FRENCH,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

Upon Appeal From the United States District Court for the Western District of Washington, Northern Division. Honorable George H. Boldt, Judge.

PETITION FOR REHEARING.

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TABLE OF AUTHORITIES CITED

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I.

Grounds for Petition for Rehearing.

Appellants respectfully request a rehearing in this matter on the following grounds:

1. The decision is predicated upon facts not properly included within the record of the case.

2. The decision fails to take into consideration arguments advanced by appellants in their reply brief and in oral argument before the Court.

3. The decision is contrary to the law as determined by the Supreme Court of the United States.

4. The decision is contrary to the Fourth Amendment to the Constitution of the United States.

II.

The Decision is Predicated Upon Facts Not Properly Included Within the Record of the Case.

The decision designates among the "Facts" of the case that "appellant Weise was known to the agents of the Federal Bureau of Investigation as a dealer in pornographic materials and of having a record of convictions as such".

The record in this case does not disclose such facts. The most that could be said in this connection is the statement as contained in the opening brief of appellee where it states that "Weise was known to have advised an informant that he had in his possession packages of pornographic photographs for sale". Even this statement however, is an exaggeration of the testimony elicited from the F. B. I. officers at the trial. The reference to this appears on page 66 of the Record where Agent Ralston is testifying as to the basis of his knowledge at the time of the arrest. He states in part that:

> "I learned through this conversation that a Mr. Weiss a dealer in photographs of an obscene nature; he worked in Los Angeles, and that he had told someone in Los Angeles he was making a trip in which he had his car loaded with the real stuff, as he described it, said that it was not just strippers this time".

The record does not contain the further alleged fact that he was "known to the agents of the F. B. I. to be a dealer in pornography" or that he had been "previously prosecuted for offenses involving obscene materials" as set forth in the brief of the appellee and as set forth in the decision of the Court.

This issue came before the Court at the time of oral argument and it was correctly pointed out to the Court that if the F. B. I. did in fact have information of this nature, it was not so disclosed in the record of this case and therefore, cannot be used as a basis for upholding the conviction of the appellant. If the Court has in fact relied upon these matters outside of the record as is indicated by the decision of the Court, the appellants would thereby be denied due process of law and the appellants should be accorded a rehearing to be given an opportunity to establish that their convictions cannot be properly upheld without consideration of these improperly considered matters.

III.

The Decision Fails to Take Into Consideration Arguments Advanced by Appellants in Their Reply Brief and in Oral Argument Before the Court.

The decision as handed down by this Honorable Court takes into consideration only the matters raised by appellants in their opening brief. No recognition is given to the response of the appellants to the Government's brief as set forth in appellants' reply brief nor is any consideration given to the cases or arguments made in oral argument before the Court.

For example, the Court cites the *Brinegar* case (*Brinegar v. United States,* 338 U. S. 160) as authority for upholding the decision of the Court below in this case. Yet, both in the appellants' reply brief and in oral argument, the *Brinegar* case was clearly distinguished from the present factual situation. The very language of the *Brinegar* case itself pointed out that it and the other leading case at that time, the *Carroll* case (*Carroll v. United States,* 267 U. S. 132), were the "border" situations and that the

questions presented there "lay on the border between suspicion and probable cause". It is true that the Court found that both of those cases fell on that side of the border allowing search and seizure. The current case however, clearly falls on the other side of the border, in that the factual situation differs in substantial degree from the *Brinegar* facts. In the *Brinegar* case, the officers who made the arrest had *personally* arrested the defendant on five previous occasions for the same crime, had *personally* seen the defendant loading liquor in the car on a previous occasion, *personally* observed the car in the location which indicated a repetition of the previous crimes for which he had arrested the defendant. Thus, in *Brinegar* as well as in *Carroll,* the arresting officer had within his own *personal* knowledge the facts upon which he based the arrest. In the instant case, the information upon which the officers relied to establish probable cause was not only hearsay but was hearsay or hearsay several times removed. It follows that the instant case must fall on the other side of the boundary which the Supreme Court delineated in the *Brinegar* case, and the search and seizure be held illegal.

The Court also failed to take into consideration the arguments advanced by Counsel in oral argument relating to the *Kremen* case (*Kremen v. United States,* 353 U. S. 346). It was pointed out that the *Kremen* case was in many ways on all fours with the present case, in that, in both cases, the breadth of the seizure was of such magnitude as to make the seizure illegal in violation of the Fourth Amendment. The Court in the *Kremen* case pointed out that it was the very breadth of this seizure that created the unreasonable search and led to the inadmissibility of the evidence seized. In the current case, the Government conceded that 85% of the material seized

did not fall within the complaint that the materials were obscene or pornographic*.

No consideration is given to the argument advanced by appellants that the arresting officers did not have probable cause for their action. Aside from all of the arguments advanced in the course of the briefs, it was pointed out that the arrest took place at approximately 11 o'clock at night, under circumstances which did not require the type of search and seizure which accompanied the arrest. Assuming all of the facts as alleged by the F. B. I. in their testimony at the trial to be true, no justification existed for the type of arrest and search and seizure which took place. This was not a fleeing car requiring the nocturnal seizure. The car had been surveilled through California, Oregon and into Washington without obtaining any adequate evidence of the commission of a crime. The only evidence that existed at the time of the arrest was the anonymous tip referred to hereinabove, the indication that the appellants had stopped at numerous establishments in these states which "dealt in" such materials (but of course, which dealt in legally saleable materials as well) and that the car was "loaded down in the back". All of these facts were as evidentiary of responsible and legal business as they were of the charge for which the appellants were ultimately convicted. What justification existed then for the arresting officers to substitute further and proper surveillance for the illegal search and seizure at a late night hour as occurred here.

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*This contrary to the language of the decision which states that "the boxes were seized incident to the arrest and were found to contain some 60,000 photographs and various *other* pornographic material." It would appear from this language that the Court assumes that all of the materials seized fell within the category of pornographic or obscene. This of course is contrary to the facts as elicited at the trial.

The Supreme Court in *Carroll v. United States,* 267 U. S. 132, the Court pointed out that:

> "It would be intolerable and unreasonable if a prohibition agent were authorized to stop every automobile on the chance of finding liquors and thus subject all persons lawfully using the highways to the inconvenience and indignity of a search."

Mr. Justice Jackson, in his dissenting opinion in the *Brinegar* case, summarizes the proper attitude towards this type of arrest and siezure when he states that:

> ". . . to trail or pursue a suspected car to its destination, to observe it and keep it under surveillance, is not in itself an arrest nor a search, but when a car is forced off the road, summoned to a stop by a siren, and brought to a halt under such circumstances as are here disclosed we think the officers are then in the position of one who has entered a home; the search at its commencement must be valid, and cannot be saved by what it turns up."

The Court failed, therefore, to take into consideration the circumstances of the arrest, search and seizure as being violative of the appellants' constitutional rights, and failed further to consider the breadth of the seizure as further indicating the impropriety of the acts of the arresting officers. For these reasons, too, the evidence seized was improperly admitted into evidence.

IV.

The Decision Is Contrary to the Law as Determined by the Supreme Court of the United States.

Appellants have already discussed the *Brinegar* and *Carroll* cases which are basic to a discussion of this case and will not repeat that discussion here.

The only other basic case cited by the Court is *Marron v. United States,* 275 U. S. 192. This case deals with a search warrant accompanying a warrant for arrest, and presents, it seems to appellants, a substantially different situation than that presented by this case. In the *Marron* case, the officers had sufficient information as to the nature of the crime being committed to actually secure a search warrant. The only issue raised by that case is whether the seizure of a few additional but closely related items to those specifically stated in the search warrant presented a situation of an unreasonable search and seizure. It is submitted that this is quite a different situation from that of officers arresting without a search warrant and then seizing the only evidence upon which the conviction is based. In the *Marron* case, the conviction could have been sustained on the basis of the items seized under the properly issued search warrant and the contested items seized were only additional and cumulative evidence. It would appear that this case cannot be used properly as a basis to sustain the decision in the *Weise and French* case.

V.

The Decision is Contrary to the Fourth Amendment to the Constitution of the United States.

It is submitted for all of the reasons as set forth in the preceding paragraphs that the defendants and appellants have been convicted unlawfully in violation of their rights under the Fourth Amendment to the Constitution of the United States and that this Honorable Court should grant appellants a rehearing in which to re-examine the decision entered by this Court.

Respectfully submitted,

Edward Mosk,

Attorney for Appellants.

Certificate of Counsel.

EDWARD MOSK, being counsel of record in the above entitled matter, respectfully submits this Certificate in support of his Petition for Rehearing on behalf of appellants.

Counsel respectfully submits that in his judgment, the Petition for Rehearing is well founded and that it is his profound belief that the Court has erred in its decision and has failed to take into consideration the matters set forth in this petition. The petition is certainly not interposed for purposes of delay and counsel sincerely believes that if the Court fails to rehear the matter, that it is a case properly for presentation to the Supreme Court of the United States.

EDWARD MOSK